SUPREME COURT OF THE UNITED STATES.

No. 282.

THE UNITED STATES, EX REL. HENRY AMY, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF BURLINGTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said Circuit Court before you, wherein the United States, on the relation of Henry Amy, is plaintiff, and the mayor and aldermen of the city of Burlington are defendants, manifest errors have happened to the damage of said plaintiff, as by his complaint appears, and we being willing, that, if any error there hath been, should be duly corrected, and full and speedy justice should be done in the premises to the parties aforesaid, you are hereby commanded, if judgment therein be given, that then, under your seal, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein, to correct the said errors, what of right, and according to the law and custom of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of said Supreme Court of the United States, this the 16 day of October, A. D. 1867.

W. G. WOODWARD,
Clerk of the Cir. C. of U. S. for Dis. Iowa.

This certifies that a copy of this writ of error was lodged in the clerk's office of the Circuit Court of the United States for the district of Iowa, on the 16th day of October, A. D. 1867, and a copy of the record and proceedings in said cause in said court is hereto annexed, as follows.

[SEAL.] W. G. WOODWARD,
Clerk of the said Circuit Court for the district of Iowa.

2 Endorsed: No. 423. U. S., rel. H. Amy *v.* Mayor and Aldermen of city of Burlington, and writ of error. Filed Oct. 16, 1867. W. G. Woodward, clerk C. C. U. S., Iowa.

United States Circuit Court for the State of Iowa.

Pleas before the Circuit Court of the United States of America for the district of Iowa.

3 UNITED STATES OF AMERICA:

Be it remembered, that, among the records and proceedings of the Circuit Court of the United States for the district of Iowa appear the following among other proceedings:

On the 1st day of April, for the year A. D. 1867, the following information for a writ of mandamus was filed by Henry Amy in said court:

In the Circuit Court of the United States for the district of Iowa.

Petition for mandamus.

THE UNITED STATES, ex. re. HENRY AMY,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Burlington.

To the judges of said court:

Now comes Henry Amy, and gives this court to be informed that he is a citizen of the State of New York, and the city of Burlington is a municipal corporation created by, and a citizen of the
4 State of Iowa, whose business is managed by a mayor and aldermen, who are citizens of said State.

That on the fifteenth day of May, 1866, your relator recovered by the judgment of the said Circuit Court of the United States for the district of Iowa, in due process of law, the sum of $28,059 11, and costs, taxed at $108 70, and interest at seven per cent; that this judgment was recovered for 563 coupons or interest warrants of $40 00 each on bonds executed and delivered by said city for railroad subscription, and the balance of the judgment for interest on the same, and on other certain coupons, on which their interest was unpaid, as by the records and proceedings of this court, now open to its inspection, will more fully appear.

That execution has been issued on said judgment, and returned no property found; that by the general laws of the State of Iowa, all the property of a public nature owned by the said corporation is exempt from execution, and the said city has no other property subject to execution; that the said general laws of the State of Iowa require in such case that the mayor and aldermen of the said
5 city should levy a tax as early as practicably to pay said judgment; that said mayor and aldermen of said city are authorized by the charter of said city to levy a tax of one per cent. per year on all the taxable property of said city, which amounts to about the sum three millions of dollars; that under these laws it was the duty of the mayor and aldermen to levy a tax of at least one per cent. in the year 1866, on the valuation of said city, to pay such judgment, interest, and costs; that they have neglected to do so, though a sufficient time for the purpose has elapsed, and a demand has been made on them to levy sufficient taxes to pay said judgment; that a levy of one per cent. in a single year is not sufficient, after paying the costs of levying and collecting, to pay said judgment, interest, and costs.

Your petitioner is without any other adequate remedy at law, and he prays of this court that a writ of mandamus may be issued from this court, commanding the said mayor and aldermen forthwith to

levy and collect a tax of one per cent. on the taxable property of said city for the year 1867, and each succeeding year, until
6 said judgment is paid, and to apply the said tax when collected to the payment of said judgment, interest, and costs, and for such other relief as the plaintiff's case requires.

HENRY AMY, *His Att'y.*
P'r J. GRANT.

STATE OF IOWA, *Scott County, ss:*

I, James Grant, declare on oath that I am the attorney of the plaintiff; that I brought the suit on which judgment was recovered, caused the execution to be issued, and made the demand to levy the tax, and I know the facts stated in said petition to be true.

JAS. GRANT.

Subscribed and sworn to by J. Grant, before me and in my presence, this 8th day of March, 1867.

Witness my hand and seal notarial the day and year last above written.

[L. S.] S. F. SMITH,
Notary Public Scott County, Iowa.

Endorsed: No. 423. Filed April 1, 1867. W. G. Woodward, clerk

7 And on the 15th day of May, 1867, and during the May term thereof, the following order was thereon made:

Information for mandamus.

THE UNITED STATES, *ex re.* HENRY AMY,
vs.
THE MAYOR AND ALDERMEN of the city of Burlington, Iowa.

Now comes the relator by Grant, his attorney, and prays for a writ of mandamus against the mayor and aldermen of the city of Burlington, Iowa, which was allowed, and said writ ordered to be issued returnable to next term.

And thereupon said writ was issued in the followings words:

Alternative writ of mandamus.

The United States of America to the mayor and aldermen of the city of Burlington, Iowa:

Whereas it has been represented to our Circuit Court of the United States for the district of Iowa, that Henry Amy, a citizen of the State of New York, had, by the judgment of said Circuit
8 Court, on the 15th day of May, 1866, recovered of the corporation of the city of Burlington, a municipal corporation created by, and a citizen of Iowa, whose business is managed by a mayor and aldermen, citizens of said State of Iowa, by due process of law, a judg-

ment for the sum of $28,059 15, and interest at 7 per cent. and costs, taxed at $108 70; that said judgment wasrecovered for 563 coupons or interest warrants of $40 00 each, on bonds executed and delivered by said city for railroad subscriptions, and the balance of said judgment for interest on the same, and for interest on certain other coupons, on which the interest was unpaid, as by the records of our said court more fully [more fully] appears; and that execution had been issued on said judgment, and returned no property found.

And that, by the general laws of the State of Iowa, all the property of a public nature owned by said corporation is exempt from execution, and that said city has no other property subject to execution; that the said general law of Iowa require the mayor and aldermen of said city, in such case, to levy and collect the taxes as early as practicable to pay said judgment; that said mayor and aldermen are author-
9 ized by the charter of said city to levy and collect a tax of one per cent. per year on all the taxable property of said city, which amounts to about three millions of dollars; that under said laws it was the duty of said mayor and aldermen to levy a tax of at least one per cent. on the valuation of said city, in the year 1866, to pay said judgment, interest, and costs; that they have neglected so to do, though sufficient time for that purpose has elapsed, and a demand has been made to levy a tax sufficient to pay said judgment; that a tax of one per cent. in a single year is not sufficient, after paying costs of collection, to pay said judgment, interest, and costs; and that said Henry Amy is without other adequate remedy at law, and we being willing to do justice in the premises, do command you, that you, the mayor and aldermen of said city, do forthwith levy and collect a tax of one per cent. on the taxable property of said city of Burlington, for the year 1867, and each succeeding year, until said judgment is paid; and that you apply said taxes, when collected, to the payment, judgment, interests, and costs, until the whole is paid; or that you appear before our
10 said Circuit Court, at Des Moines, at the court-house, in Polk county, on the 3d Tuesday of October, A. D. 1867, to show cause why you refuse so to do.

Witness the Hon. Salmon P. Chase, Chief Justice of our Supreme Court of the United States, and the seal of our Circuit Court, this 16th day of May, A. D. 1867.

[L. S.] (Signed) W. G. WOODWARD,
Clerk C. C. U. S.

Endorsed: No. 423. Filed October 16th, 1867.

And the following indorsement is made thereon:

BURLINGTON, IOWA, *Sept. 10th*, 1867.

By instruction of the mayor and aldermen of the city of Burlington, in council assembled, service of the within writ is hereby accepted in full.

(Signed) B. J. HALL.
City Solicitor.

And on the 16th of October, 1867, the following return was made to said writ:

11 THE UNITED STATES, on relation of Henry Amy, *vs.* THE MAYOR AND ALDERMEN OF THE city of Burlington.

Return to alternative writ of mandamus, issued out of the Circuit Court of the United States, within and for said district and division.

THE UNITED STATES OF AMERICA, *State of Iowa, ss*:

And now come respondants and show cause why they have not obeyed said writ and why the peremptory writ should not be issued in the premises; and say that deft., or the common council of the city of Burlington, have no authority or legal power or duty to levy any taxes whatever, except in the manner, for the purposes, and to the extent provided in the charter of said city and its amendments, which, being public statutes, are hereby referred to and made a part of this return. That by said provision it is provided as follows, to wit: "That to defray the currant expenses of the city, the city council shall have
12 the power to levy and collect taxes on all the real [&] and personal property in said city not exempted by the general law from taxation. Provided, that the amount of taxes levied for said purpose shall not in any one year exceed one dollar on each one hundred dollars worth of property taxed." That heretofore, for many years, the said council of said city has levied said tax of one per centum, and the proceeds of such levies when collected have been appropriated to the current expenses of said city. And that heretofore, to wit, on the day of , 1867, at the usual time, their present council proceeded and levied a tax of one per centum in the manner and for the purposes provided by the charter and ordinances of said city, and the warrant for collection is now in the hands of the collector of said city and in process of collection, said taxes so levied becoming delinquent in February, A. D. 1868. And so, deft. say, as they are advised by counsel, they have exhausted their power and performed their duties in the premises.

And for further cause why said peremptory writ should not issue, def't's say that the judgment obtained by relator was based in part
13 upon coupons of certain bonds issued by the officer of said city of Burlington, as a town, to the Burlington and Missouri River Railroad Company, but what proportion of said judgment was for said coupons respondant is not now advised. That respondant cannot safely, and ought not to be required to, levy a tax as demanded by relator, because heretofore in a suit pending in the District Court of the State of Iowa, for Des Moines county, wherein E. Chamberlain and other pl't'ff's and respondant was def't, a decree was rendered perpetually enjoining and restraining respondant from levying any tax upon the taxable property of said city to pay off said

bonds or coupons, which said decree is still in full force and virtue. And respondants cannot, as they are informed by counsel, obey this writ of mandamus without violating said injunction and becoming liable to the pains and penalties of contempt to said District Court, a copy of which said decree is hereunto attached as part of this return, and marked exhibit A. And so respondants say they ought not to be required to levy said tax. And respondants having answered, ask to be discharged, with their reasonable costs.

(Signed) J. L. CORSE,
Mayor of the City of Burlington.

14 Subscribed and sworn to by J. L. Corse, mayor of said city of Burlington, this 14th day of Oct., 1867.

[L. S.] O. C. WIGHTMAN,
Notary Public in and for said County and State.

STATE OF IOWA, *Des Moines County, ss:*

Be it remembered, that at a term of the District Court, within and for Des Moines county and State of Iowa, begun and holden at the court-house in the city of Burlington, on the first Monday, to wit, the 2d day of October, A. D. 1865, Hon. Francis Springer, sole judge of the first judicial district of said State, presiding, on the 11th day of said term, it being the 13th day of October, A. D. 1865, among other, the following proceedings were had and entered of record, to wit:

ELISHA CHAMBERLAIN *et al.*
vs.
THE CITY OF BURLINGTON. } N. 404.—Ch'y.

And now, on this day, this cause came on to be heard on def'ts demurrer to complainants' bill, complainants appearing by Chas. H. Phellps, their solicitor, and defendants by B. J. Hall, their
15 solicitor, and all things being seen and heard and considered by the court, the court overruled said demurrer; and the defendants electing to stand on their said demurrer, and interposing no further plea or answer to complainants' bill, and the evidence being seen and heard, the court finds the allegations of complainants' bill to be true.

It is therefore ordered, adjudged, and decreed by the court that the defendants, the city of Burlington, and the mayor, and aldermen, and treasurer thereof, and their successors in office, and all persons acting by, through, or under them, be and they are hereby, perpetually and forever enjoined and restrained from further proceedings in the levy and collection of the said taxes for the payment of the interest or principal of said seventy-five thousand dollars, bonds issued as a loan to the Burlington and Missouri River Railroad Company, on the first day of August, A. D. 1856, under said ordinance No. 44, and from levying any tax for said purpose.

It is further ordered, adjudged, and decreed, that complain-

16 ants do have and recover of the deft's, the city of Burlington, the costs and charges of this suit, taxed at five dollars.

October 13th, 1865.

(Signed) FRANCIS SPRINGER, *Judge.*

STATE OF IOWA, *Des Moines County, ss:*

I, William Garrett, clerk of the District Court, within and for the county of , State aforesaid, do hereby certify the foregoing to be a full, true, correct, and complete copy of the entry of record and judgment (and also for bill,) in above-entitled cause, as rendered by said District Court at the October term, A. D. 1865, as full, true, correct and complete as the same remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court hereto, at my office in Burlington, Iowa, this 14th day of October, A. D. 1867.

[L. S.] WILLIAM GARRETT,
Clerk District Court.
T. G. FOSTER, *Dep.*

Endorsed: No. 423. Filed Oct. 16, '67. W. G. Woodward, clerk.

17 And thereupon the relator filed the following demurrer, as follows:

U. S. C. C. Dist. Iowa.

Demurrer to return.

THE UNITED STATES, on relation of Henry Amy, *vs.* THE MAYOR AND ALDERMEN of the city of Burlington.

Now comes the plaintiff by Grant, his attorney, and says he ought not to be barred from maintaining his aforesaid writing by reason of anything alledged in the return of the defendants, and the same is not sufficient in law to bar his said writ; therefore, for want of sufficient return, the plaintiff prays judgment that said writ may be peremptory, and for his costs.

And for causes of demurrer to said return the relator says—

1st. That all of said return, in the first part thereof, down to the words, "and for further cause," &c., wherein the defendants set up a levy of a tax of one per cent., under the city charter, is insufficient.

Because, 1st. That part of the return is no answer to the
18 allegations of the writ, that the geheral laws of the State which require the defendants to levy a tax sufficient to pay said judgments, and said general law of the State applied to all municipal cor-

porations, and compels the proper officers to levy a tax to pay a judgment within a reasonable time after the recovery of a judgment.

2d. The said part of said return shows no cause why the said mayor and aldermen of said city do not apply or appropriate the said tax of one per cent., which they are alleged to have levied in 1867, to the payment of said judgment; and in the absence of a better lien or older judgment than the plaintiff's, he is entitled to the whole of said levy, less the cost of collection.

3d. The said return does not show for what purpose said levy of 1867 is appropriated, and does not apply, or offer to apply, the same to the plaintiff's judgment.

4th. Because the relator is entitled to have the defendants' levy, under the general laws of the State, a specific tax to pay his judgment, and the city charter is no restraint on this power.

And for further cause of demurrer to second clause of said
19 return, beginning at the words, "and for further cause," &c., to the end, relator demurs—

1st. Because it appears from the judgment decree cited in said return, and annexed as exhibit "A," that the relator was no party to said decree, and the same is not binding on him, and no bar to his relief sought.

2d. The said part of said decree does not, by its recitals or exhibits, show on what ground said bill was filed, nor what relief was sought, nor is the bill or demurrer set out, so as to enable this court to determine whether the same is a bar to the relief sought.

3d. It appears from said decree, that it was an action between the plaintiff's tax payers of Burlington, and the mayor and aldermen, their agents, to annul bonds belonging to third parties, who are not before the court; and as to the plaintiff in this suit, the decree is a nullity, the same as if it was not made.

4th. The State court had no jurisdiction of the plaintiff, a citizen of New York. He was not before the court, and a decree an-
20 nulling his bonds, and prohibiting payment thereof by taxation, the only way they can be paid, is not binding on this court or said defendants, is a violation of the Constitution of the United States, and null and void.

5th. Because it appears from the judgment in favor of Amy that only fifteen hundred dollars thereof was for the bonds referred to in said decree; and as to the residue of his judgment, that part of the return is no answer.

(Signed). J. GRANT, *For Pl'tiff.*

Endorsed: No. 423. Filed October 16, 1867. W. G. Woodward, clerk.

And the following judgment was rendered thereon:

Information for mandamus.

THE UNITED STATES, on the relation of Henry Amy,
vs.
THE MAYOR AND ALDERMEN of the city of Burlington.

Now comes the plaintiff by Grant, his attorney, and the defendants by Hall, their attorney. The defendants filed a return
21 to said alternative writ, and the plaintiff filed a demurrer to said return, and the court, on joinder and argument, overruled said demurrer, and each of the causes thereof.

And the plaintiff elected to abide by the demurrer; and thereupon it is ordered and adjudged, that said information be dismissed, and the defendants recover of the relator their costs, taxed at $, and have execution therefor.

And thereupon the plaintiff prayed a writ of error, which is allowed him, on his giving bond in the penal sum of two hundred dollars, with Charles Whitaker, surety, conditioned as the law directs.

The following bond was thereupon filed:

Know all men by these presents that we, Henry Amy, as principal, and Charles Whitaker, surety, are held and firmly bound to the mayor and aldermen of the city of Burlington, Iowa, in the penal sum of two hundred dollars, to which payment we bind ourselves and each of us. Given under our hands at Des Moines, this 16th day of October, 1867.

The condition of the above obligation is this: Wheresas,
21½ the United States, on the relation of Henry Amy, has taken a writ of error to the Supreme Court of the United States from the Circuit Court of the United States for the district of Iowa, in a cause therein pending, wherein said United States, on the relation of Henry Amy, is plaintiff, and said mayor and aldermen of the city of Burlington are defendants. Now, if said plaintiff in error shall prosecute his writ to effect, and shall answer all damage and costs, if he fail to make his plea good, then this obligation shall be void, otherwise remain in full force.

HENRY AMY,
By J. GRANT, *Att'y.*
CHARLES J. WHITAKER.

Filed Oct. 16th, 1867.

I, W. G. Woodward, clerk of the United States Circuit Court for the district of Iowa, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of all the papers filed and records made in my office in the case of the United States, on the relation of Henry Arny *vs.* The Mayor and Aldermen

of the city of Burlington, as full, true, correct, and complete
22 as the same appear on file and on record in my office.

In testimony whereof, I have hereunto set my hand and the seal of said court this 4th day of November, A. D. 1857.

[SEAL.] W. G. WOODWARD,
Clerk as aforesaid.

23 In the Supreme Court of the United States.

To the Mayor and Aldermen of the city of Burlington, Iowa:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the next term thereof, to be held at Washington city, on the first Monday in December next, to answer to a writ of error therein pending from the Supreme Court of the United States to the Circuit Court of the United States for the district of Iowa, in a cause therein pending, wherein the United States, on the relation of Henry Amy, is plaintiff in error, and you are defendants in error.

Des Moines, Iowa, 16 October, 1867.

S. F. MILLER,
Judge of the Circuit and Justice of the Supreme Court.

Due service of this citation was made and accepted by the defend ants in error.

J. C. & B. J. HALL,
Attorney for Defendants in error.

A true copy of citation.

W. G. WOODWARD,
Clerk C. C. U S., Iowa.

A copy of this citation, duly accepted by the defendants in error, was filed in the office of said clerk of said Circuit Court on the 16th of October, 1867.

[SEAL.] W. G. WOODWARD, *Clerk.*

Fees: $4 70 copy.
35 certif. and seal.

5 05

Paid by relator.

24 In the Supreme Court of the United States.—December term, 1867.

THE UNITED STATES, on the relation of Henry Amy, plaintiff in error, *vs.* THE MAYOR AND ALDERMEN of the city of Burlington, defendants in error.	Error to the Circuit Court for the district of Iowa.

The said Henry Amy, the relator, now comes and assigns for error in the trial of this cause in the court below, that said court erred in overruling his demurrer to the defendants' return to the alternative writ, for the causes set forth in said demurrer, and dismissing his writ; and he, therefore, prays that said judgment may be reversed with costs.

GRANT,
For the Plaintiff in error.

Endorsed: Supreme Court U. States. 282. D. T., 1867. U. S., ex rel. Amy, P. E. *vs.* Mayor, &c., of City of Burlington. Assignment of errors. Filed 22 Nov'r, 1867.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, ON THE RELATION OF HENRY AMY,
Plaintiff in Error,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF BURLINGTON,
Defendants in Error.

FROM THE DISTRICT OF IOWA.

ARGUMENT FOR PLAINTIFF IN ERROR

BY J. GRANT.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, ON THE RELATION OF HENRY AMY, *Plaintiff in Error*,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF BURLINGTON, *Defendants in Error.*

ERROR FROM THE DISTRICT OF IOWA.

ARGUMENT FOR PLAINTIFF IN ERROR.

Case.

Henry Amy, of the State of New York, on the 15th of May, 1866, recovered judgment against the corporation of Burlington, Iowa, in the Circuit Court for that State, for the sum of $28,059.11 and costs, being interest on certain bonds executed by the city of Burlington. Of this sum, $22,520 was for subscriptions to railroads, and the balance on other bonds issued by Burlington, being bonds loaned to a railroad to assist it in building a bridge, and which are similar to the bonds held valid by this Court, and invalid by the Iowa Supreme Court.

Execution was issued on said judgment, and returned no property. On this judgment the relator obtained an alternative writ of mandamus, in which, after alleging the foregoing facts, he avers, that by the general laws of Iowa the property of a public corporation was exempt from execution; that said corporation had no other property subject to execution; that the general laws of Iowa required, in such cases, that the mayor and aldermen of Burlington should levy a tax as early as practicable to pay said judgment; that the mayor and al-

dermen of Burlington were authorized by the charter of said city to levy a tax of one per cent. on all the taxable property of said city, which amounted to about three millions of dollars, and under these laws it was the duty of said mayor and aldermen to levy a tax of at least one per cent. in the year 1866, to pay said judgment; that they have neglected so to do, though a sufficient time has elapsed, and a demand has been made; that a levy of one per cent. in a single year is not sufficient to pay said judgment, interest and costs; that the relator was without other adequate remedy at law, and the said mayor and aldermen were commanded to levy and collect a tax of one per cent, to pay said judgment, on the taxable property of said city for 1867, and each succeeding year, until the whole debt was paid, or show cause to the contrary.

The defendants made return to said alternative writ, that the mayor and aldermen had no authority or legal power to levy any tax except in the manner and for the purposes authorized by the city charter and its amendments; that by the said acts, "to defray the current expenses of said city, the city council shall have power to levy and collect, on all taxable property not exempt by general law from taxation, provided the amount for any one year should not exceed one per cent.; that heretofore the mayor and aldermen had levied said tax, and the proceeds, when collected, had been appropriated to pay the current expenses of said city; that on the day of , 1867, at the usual time of levying taxes, they had levied for purposes named in the charter, and the warrant for collection was then in the hands of the proper officer, and would be delinquent in Feb., 1868, and they are advised that by such levy they had exhausted their power in the premises.

And for further return, they answer that part of said judgment was based on coupons on bonds issued by the officers of said city as a loan to the Burlington and Missouri River Railroad Company, but what proportion the defendants are not advised; that one Chamberlain and others had obtained in the District Court of the State of Iowa, an injunction against

levying any tax to pay said last named bonds, and a copy of the same was added, which simply sets out the record of a decree in Chamberlain and others v. The City of Burlington, in October, 1865, which recites that on a demurrer to the bill it was overruled, and defendants abiding by their demurrer, the court finds the allegations of the bill to be true, and the defendants —the city of Burlington and the mayor and aldermen, and their successors in office—were perpetually enjoined from levying and collecting any taxes for the payment of the principal or interest of said $75,000 bonds, issued as a loan to the Burlington and Missouri River Railroad Company on the 1st of August, 1856, under ordinance 44.

It does not appear, nor is it alleged that the plaintiff, or any person through whom he claims, was a party to this suit; nor did it appear that the plaintiffs were tax-payers or citizens of Burlington.

The relator demurred to this return for the following causes:

1st. To so much as sets up the limitation of the city charter to a tax of one per cent., because that part of the return was no answer to the allegation of the writ, that the general laws of the State required the defendants to levy a tax sufficient to pay said judgment, and said general laws apply to all municipal corporations, and compel the proper officers to levy a tax to pay said judgment, within a reasonable time after recovery.

2d. That said return shows no cause why the Mayor and Aldermen did not apply or appropriate the tax of one per cent., which they alleged they were authorized to levy, in 1867, to pay said judgment, and in the absence of a better lien or older judgment, the plaintiff was entitled to the whole of said levy, less the cost of collection.

3d. The return did not show for what purpose the levy of 1867 was appropriated, and did not apply it to plaintiff's judgment.

4th. The relator had a right, under the general law, to compel a specific tax to pay his judgment, and the city charter is no restraint on that power.

To the second ground of defense in the return, the State Court injunction, the plaintiff demurred,

1st. Because it appeared that the plaintiff was no party to the proceedings in the State Court, and the decree, as to him, is a nullity.

2d. The said decree does not show for what cause said injunction was allowed, and the record is defective in not showing the causes which induced the act of the Court, so as to enable the Circuit Court to determine whether it was a bar or not.

3d. It appears that the suit was between tax payers and their agents to annul bonds belonging to third parties not before the Court, and as to plaintiff it is null and void.

4th. The State Court had no jurisdiction of the plaintiff, a citizen of New York; he was not before the Court, and a decree annulling his bonds, or the payment of the same by taxation, the only way they could be paid, is a violation of the constitution.

5th. Because it appears from Amy's judgment that only a small portion of his judgment was in bonds referred to in the decree, and as to the balance, that part of the return is no answer.

The Court overruled this demurrer. The relator abided by it, his suit was dismissed, and he brings this writ of error, assigning for causes of error the grounds of his demurrer above noted.

Argument.

For the convenience of the Court, we copy the taxing clause of the charter of Burlington, and the laws of the State in relation to executions against municipal corporations:

The act of the territorial legislature to incorporate the city of Burlington, approved June 10, 1845, provides, section 25, "That to defray the current expenses of said city, the city council shall have power to levy and collect taxes on the real and personal property therein, provided the amount of taxes so levied shall not, in any one year, exceed twenty-five cents on each hundred dollars worth of property taxed."

This act was amended by the 1st section of act of 22d February, 1847, as follows: "That the amount to be levied, &c., after the taking effect of that act, shall not exceed 12½ cents on every hundred dollars worth of property to be assessed."

This act was amended by act of 22d January, 1853:

"SEC. 1. That to defray the current expenses of said city, the city council shall have the power and authority to levy and collect taxes on all real and personal property in said city not exempted by the general law from taxation, provided the amount of taxes so levied for said purpose shall not exceed one dollar on each one hundred dollars worth of property taxed."

The code of 1857, § 1895, and the code of 1860 re-enacted § 3274, provides, under the head of execution, "Public buildings owned by the State, or any county, city, school district or other civil corporation, and any other public property which is necessary and proper for carrying out the general purpose for which any such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation. Code of '51, § 1896, of '60, §3275. In case no property is found on which to levy, which is not exempted by the last section, or if the judgment creditor elect not to issue execution, he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable to pay off the judgment, interest and costs."

The words about scrip and evidences of debt have been decided by the Supreme Court to have no force, and the section, stripped of these words, reads thus: "In case no property is found on which to levy an execution, which is not exempted in the last section, a tax must be levied as early as practicable, sufficient to pay the judgment, the interest and costs."

The code of 1851, § 1897, code of '60, § 3276, provides: "A failure on the part of the officers of the corporation to

comply with the requirements of the last section, renders them personally responsible for the debt."

The bonds on which the coupons in this judgment were recovered, had endorsed on them the ordinance authorizing their issue, among others, the following words:

"Be it further enacted, that it shall be the duty of the council to provide means to meet the payment of said bonds and coupons when the same may become due, according to the contract entered into for said loan, and to pay the same."

The bonds made by the city of Burlington were issued under section 27 of the act of 1845, which is as follows: "That whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Burlington, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes. The like notice shall be given as in cases of an election. The loan shall not be made unless two-thirds of all the votes polled at such an election shall be given in the affirmative."

We should regard the mere reading of these statutes as ample argument for reversing this judgment, but for the following opinion of Justice Miller in Learned v. The Mayor, &c., of Burlington, Law Register, new series, vol. 2, pages 397 and 398:

After quoting the acts of '47 and '53, Justice Miller says: "The result of these two sections, considered alone, would seem to be, that except for the purpose of the paying the current expenses of the city, the tax cannot exceed one-eighth of one per cent., and cannot, for any or all purposes, exceed one per cent."

Placing a running commentary upon this opinion as we cite it, the proper interpretation of the whole taxing power of the city of Burlington is, that they can levy no taxes except for current expenses. By the act of '45, they could levy 25 cents on the hundred dollars; by the act of '47, this power was repealed and reduced to 12½ cents; and by the act of '53, this was repealed, and the power enlarged to one dollar on the hundred.

Unless debts falling due on contracts previously made were a part of the current expenses of the year, there is no power under the city charter to apply any of the money raised by taxes under the city charter, to pay such debts.

The opinion continues: "Do the provisions of §§ 1895, 1896 and 1897 of the code repeal the above sections of the city charter, or do they override them when brought in question together, or is there any necessary conflict between them? There is certainly no express repeal, and the code could not be intended by implication to repeal the section last quoted, act '53, for it was passed since the code became the law of the land. The rule is also well understood, that a repeal by implication can only arise when that is the necessary inference from the impossibility that both acts supposed to be in conflict can stand. If either act is to override or repeal the other, certainly the latter expression of the legislative will must stand in preference to the other."

Which latter—code of '51, charter of '53 or code of '60?

"But in the present case there is no such necessary conflict. The provisions of the code can have their effect by compelling the city council to levy the tax, *so far as it has power to levy it.*" Which is a power to levy to pay the whole judgment, without qualification. "The provisions of the charter can stand as they were intended, a useful and just limitation of that power." Which is a power to tax one per cent. to pay current city expenses, and to prevent excess of which the tax payers would find more ready listeners in the State Courts than creditors who seek to get the fund.

"The previous year to this the city council of Burlington only levied a tax of one-half per cent. Undoubtedly if this was found to be inadequate to meet the current expenses and to provide a fund to meet the judgment, it was the duty of the council, under § 1897 of the code, to so increase the tax, *inside of one per cent.*, as to raise that fund, if it could be so done." That interjected and emphasized sentence, "*inside of one per cent.*," is not in the code. The code, after exempting public and private property, §§ 1895 rnd 1896, says, not

if the half per cent. is not sufficient, levy the one per cent., but if no property is found, "a tax must be levied to pay the judgment," not a tax must be levied "inside of one per cent." "This," continues the opinion, "they aver they have done to the full extent of their authority, and this Court will not order them to exceed it.

"That this is a sound view of the intention of the framers of the code, is strongly to be inferred"—where a statute is plain you can make no inference—"from some of its provisions on the subject of town and city corporations.—Chapter 42 is devoted to providing the manner in which the citizens of a village or town may organize themselves into a corporation, and may either assume the privileges and responsibilities of towns or cities, according to the number of the population. In speaking of a town charter thus adopted, it says, § 665, that it may give power to establish by-laws, ordinances, &c., and 'to levy and collect taxes on all property within the limits of such corporation which, by the laws of the State, is not for all purposes exempt from taxation, which tax must not exceed one per cent. per annum on the assessed value thereof;' and § 669 says that "the preceding provisions are applicable to a town desiring to become organized as a city." "Now these are the very corporations mentioned in §§ 1895 to 1897, inclusive, of which it said that a tax must be levied to pay a judgment recovered against them. Was it meant that they should absolutely at once levy a tax sufficient to pay the debt, without regard to the one per cent. limitation in the previous section, or was it meant that they should use such taxing power as they had for that purpose, and no more? If the former is the sound construction, then the limit to the taxing power is nugatory, and it makes no difference how strongly the legislatures or the charter adopted by the people may forbid excessive taxation, the authorities may, by resorting to the power to make contracts, impose upon the property holder a tax unlimited in amount or duration. The wisdom of that provision in the code, and in the charter of the city of Burlington, has been amply vindicated by

events occurring since their enactment, and they should not be lightly set aside."

"As it appears, then, to the Court that the city authorities have already levied, for the present year, a tax as large as the law permits, no writ of mandamus can rightfully issue to compel them to levy more.

"The demurrer of plaintiff being to the whole answer, is overruled, and the application for a writ of mandamus is refused."

We should not feel called upon to argue the meaning of the words, "A tax must be lexied to pay off the judgment," but for this decision.

It is true, that where two statutes conflict, it is the duty of a Court so to construe them that both can stand; but it is not good logic to assume a conflict where none exists, to do away with the plain meaning of words. One of the elementary rules of interpretation of a statute is, that where the words are so plain as to be perfectly understood, there is no occasion for construction. If the meaning be plain, the Court follows, but has no occasion to construe them differently from such plain meaning. "*Absoluta sententia expositore non indiget.*"

"As a primary rule, the intention of the legislator is to be gathered from the words. Where the words are not explicit, it is to be gathered from the occasion and necessity of the law. Four things, in such cases, are to be considered: 1st, What was the law before; 2d, What was the mischief and defect of it; 3d, What remedy was proposed; and 4th, The true reason for the remedy." Dwarris on Statutes, 694.

"Where authorities are silent, I hold myself bound to construe the act of parliament according to the plain and popular meaning of the terms." Tenterden, Dwarris, 708.

We could extend this brief indefinitely with cases obeying these elementary principles; but the words of the code are so plain, that "cconstructions construed" will not enforce our argument.

There is no indefinite meaning that can be attached to the

words, that "in case no property is found, on which to levy an execution, a tax must be levied *sufficient* to pay the judgment, interest and costs;" "if the proper officers fail to do it they are personally liable."

To overcome the plain meaning of these words, the court below assumes there is a conflict between the provisions of the charter "that to defray the current expenses of the city the tax shall not exceed one per cent." That prohibition does not conflict with the law of the code, that "when judgment is recovered and no property found, a tax *suffieient* to pay the judgment must be levied." The code gives a new grant of power, imposes new duties by general law on all corporations, in addition to the powers granted by the special charter. It is bad logic to say "the provisions of the code can have its effect by compelling the council to levy as far as they have the power to levy." This is begging the question. The code gives the power to levy sufficient to satisfy the judgment.

The next argument assumed is that the general law as to cities allows them to levy a tax of only one per cent. There is no more force in this argument than the other. For ordinary purposes, they can only levy what the city charter allows, but where a judgment is recovered, they must levy sufficient to satisfy the judgment. Suppose the city charter did not allow the corporation to levy any tax whatever, but provided for its current expenses by licenses, wharfage, &c., and a judgment was recovered against it—would any man deny that, under the code, after execution returned, the power would not be conferred by the code to levy sufficient to pay the judgment.

The last argument is the one from inconvenience; that "no matter how strongly the legislature may forbid taxation, if our construction is correct, the authorities may impose on the property-holders unlimited taxes, by making contracts." The answer to this is twofold: The property-holder has a perfect remedy to prevent unlawful contracts by resorting to the State Courts; lawful contracts ought to be paid; if the power to

pay them did not exist, it ought to be conferred. Shall the teacher, who is lawfully employed by the corporate authorities to educate the tax-payer's child, go without his salary because the trustees value education above property? Yet the construction of these laws put on them by the Court below would inculcate from the bench the immorality of repudiating the debt which educates the child.

The legislature has provided a remedy against this very abuse of "contracting debt" power, which is quite as satisfactory as that proposed by the argument. It is this: That the corporate authorities shall create no debt, of this description, except it be first voted and authorized by two-thirds of the voters of the town. I shall not undertake to deny that the people are just as able to take care of themselves as anybody else, and if they were not, the legislature, whose business it is to prevent excessive taxation, have not, in that respect, transferred the power to the much wiser tribunal, the courts of the country.

Let us look, in conclusion, for the interpretation of the code, to the rules laid down for us.

There is no ambiguity in the words. They are explicit.

It was the law before the code was passed that, where a judgment was recovered against these corporations, all the public property could be seized upon to pay a judgment against the corporation. The private property of any or every citizen could be levied upon to satisfy the debt of the corporation. The remedy proposed by this law in express terms was to prevent that mischief, and in lieu thereof to require a tax to be levied on the whole taxable property to pay the judgment, so that the public property could be preserved, and all the property of the citizens compelled to unite in paying the debt; and the reason of this remedy was, that while it gave the creditor ample security for his debt, at the same time it prevented public and private mischief.

The Supreme Court of the State has held, 17 Iowa, 1, Coy v. Lyons, that the creditor, after judgment, is entitled to the whole tax levy, after deducting expenses, but the same tribu-

nal has intimated that the code does not mean what it says, and has frittered away the action against the officers, so that nothing could be made of them if they were solvent.

We do not apprehend that the plaintiff will be deprived of his adequate remedy by mandamus, by turning over to a suit against the officers. That is rather too slow and uncertain a process.

The defendants have not, by their answer, shown any reason why the plaintiff should not have the fund they have levied, though undoubtedly they intend the Court to understand that it will be exhausted by the current expenses. This we concede they will do, and a great deal more, if they had it, before they will pay this judgment. It is their right to do this we contest.

The demurrer which involves the power of State Courts to arrest the execution of these writs by injunctions, to which the bondholder is not a party, will be decided long before this cause is reached, and we need not argue that part of it.

J. GRANT, for plaintiff.

Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 134.

THE UNITED STATES, EX REL. HENRY AMY, PLAINTIFF IN ERROR,

vs.

THE CITY OF BURLINGTON, IOWA, DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFF IN ERROR.

F. A. DICK,

Of Counsel for Plaintiff in Error.

J. L. Pearson, Printer, corner 9th and D streets.

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ARGUMENT FOR PLAINTIFF IN ERROR.

Statement.

Judgment was rendered on the fifteenth May, 1866, in the United States Circuit Court for Iowa, in favor of Henry Amy against the City of Burlington for $28,059.11 on interest coupons annexed to certain bonds executed by the city, the larger part of which was for subscription to railroads. An execution issued on the judgment was returned *nulla bona*. On first April, 1867, application was made to the court for an alternative writ of mandamus, requiring the city authorities to levy a tax to pay the judgment, which was issued on the sixteenth May, 1867, to which a return was made on the sixteenth October, stating that the council of the city have no authority to raise a tax, except under the charter, which provides, "that to defray the current expenses of the city, the city

council shall have the power to levy and collect taxes on all the real and personal property in the city, not exempted by the general law from taxation: *Provided*, That the amount of taxes levied for said purpose shall not in any one year exceed one dollar on each one hundred dollars' worth of property taxed. That heretofore, for many years, the said council of said city has levied said tax of one per cent., and the proceeds of such levies, when collected, have been appropriated to the current expenses of said city. And that heretofore, on the day of ——, 1867, at the usual time, their present council levied a tax of one per cent. in the manner and for the purposes provided by the charter and ordinances of said city. * * * And so, defendants say, as they are advised by counsel, they have exhausted their power and performed their duties in the premises."

A further defence of an injunction is made similar to that made in cases Nos. 412 and 413, heretofore submitted and decided at this term of the court.—(p. 5.)

A demurrer to this return was overruled, and judgment was rendered for the defendant, and the cause is brought here by writ of error.

The alternative mandamus, after stating the judgment and execution returned unsatisfied, shows that by the general laws of the state all the property owned by the corporation used for public purposes is exempt from execution, and that the city has no other property, and that the general law requires the city to raise a tax to pay such judgment. The only question in the case arises on the construction of the general law of the state under the head of execution, which requires a tax to be raised to pay the debts of a municipal corporation, in connection with the provision in the city charter, which limits the power of the council to tax not exceeding one per cent. per annum to defray the current expenses of the city.

It is conceded that the mandamus should be made peremptory, if under these laws it is the duty of the city

council to levy a tax to pay the judgment in this case; and it is further conceded, that the general laws of the state impose such duty, subject only to the effect of the limitation in the charter.

It is denied by the plaintiff that the limitation in the charter has any application to a tax required to be raised to pay a judgment.

These laws are as follows:

First.—The charter approved June 10, 1845, the 1st section of which defines the limits of the city and confers the ordinary corporate powers, to be executed by a mayor and board of aldermen.

The 25th section provides, "that to defray the current expenses of said city, the city council shall have power to levy and collect taxes on the real and personal property therein, provided the amount of taxes so levied shall not in any one year exceed twenty-five cents on each one hundred dollars' worth of property taxed."

By act of twenty-second February, 1847, this limit of taxation was reduced to the *one-eighth* of one per cent., in these words: "That the amount to be levied, * * * after the taking effect of this act, shall not exceed twelve and one-half cents on every one hundred dollars' worth of property to be assessed."

And by act of twenty-second January, 1853, the limit of taxation was placed at one per cent. per annum, in these words:

"That to defray the current expenses of said city, the city council shall have the power and authority to levy and collect taxes on all real and personal property in said city, not exempted by the general laws from taxation, provided the amount of taxes so levied for said purpose shall not exceed one dollar on each one hundred dollars' worth of property taxed."

The 27th section provides, "That whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Burlington, the nature and ob-

ject of the loan shall be stated, and a day fixed for the electors of said city to express their wishes. A like notice shall be given as in cases of an election. The loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative." This act was passed June 10, 1845.—(Laws of Iowa, 1844–45, p. 73, chap. 54.)

On the twenty-fifth January, 1855, the legislature passed "an act regulating the interest on city and county bonds," providing:

SEC. 2. "That whenever any railway company shall have received, or may hereafter receive, the bonds of any city or county upon subscription of stock by such city or county, such bonds may have interest at any rate not exceeding ten per cent., and may be sold by the company at such discount as may be deemed expedient."—(Acts of 1854–5, p. 192, chap. 128, bonds.)

And on the same day passed another act, providing "that in all cases where county, or town, or city incorporations have, or may hereafter, become stockholders in railroads, or other private companies or incorporations, it shall not be lawful for the county judges, mayors, or other agents of such cities or counties to issue the bonds of their counties or cities until they are satisfied that the contemplated improvements will be constructed through or to their respective cities or counties within thirty-six months from the issuing or delivery of said bonds: * * *Provided*, That nothing in this act shall in any way affect corporation rights for any contracts or subscriptions heretofore made with any railroad company or corporation for the issuing of county corporation bonds."

The charter of the city of Muscatine is in the same words as that of Burlington, and of that charter and the two acts above cited, the court say, in Meyer vs. The City of Muscatine, 1 Wall., 384, 390, "when the bonds were issued the acts of the legislature of Iowa of the twenty-fifth January, 1855, were in force. These acts, in con-

nection with the provision of the charter, furnish, in our judgment, a conclusive answer to this objection," namely: the want of authority to borrow money to aid in the construction of railroads.—(See the same acts construed in 1 Wallace, 220, suit No. 81.) These acts are set out in full in 1 Wall., 184, 185, Gelpcke vs. Dubuque. The bonds in question were issued to pay a subscription to the Burlington and Missouri River Railroad Company, under "an ordinance to authorize a loan of city bonds, to the amount of seventy-five thousand dollars, to the Burlington and Missouri Railroad Company," and endorsed on the bonds was the ordinance in part, as foll

"*Be it further enacted*, That it shall be th council to provide means to meet the pay bonds and coupons when the same may be cording to the contract entered into for sai pay the same."

In relation to the payment and liabilities for debts of civil corporations, the general laws provide that "public buildings owned by the state, or any county, city, or school district, or other civil corporation, and any other public property which is necessary and proper for carrying out the general purpose for which any such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation."—(Code of 1860, sec. 3,274.)

"In case no property is found on which to levy, which is not exempted by the last section, or if the judgment creditor elect not to issue execution, he is entitled to the amount of his judgment in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no script or evidences of debt, a tax must be levied as early as practicable to pay off the judgment, interest, and costs."—(Code of 1860, sec. 3,275.)

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"A failure on the part of the officers of the corporation to comply with the requirements of this last section renders them personally responsible for the debt."—(Code of 1860, sec. 3,276.)

ARGUMENT.

These laws show that the legislature has given a corporate existence to the City of Burlington—authorized its mayor and council, on their own discretion, to levy taxes, "to defray the current expenses of the city," not exceeding one-half per cent. in 1845, one-eighth in 1847, and one per cent. in 1853; and has also authorized the city council, not on their own discretion, but on consultation with the people, and on receiving specific authority, through an election, "to borrow money for any public purpose;" and two years after the last amendment of the charter, by the two acts of twenty-fifth January, 1855, gave full legislative approval and authority to the city to contract the debts, and incur all the legal obligations incident thereto, the payment of which is the object of this suit. The laws further show that the legislature has undertaken fully to provide for not only the contracting of debts by civil corporations, but also for the payment of the same, and so the act which exempts public property, of a kind possessed by almost all cities, from the process of execution, and also the private property of the citizens, makes it the duty of the city to raise money, by means of a tax, to be levied as early as practicable, to pay judgments. The obligatory force of these laws is conceded by the defendant, but it insists that it finds, as a part of this system, a provision which limits the liabilities of its citizens to taxation to an amount not exceeding one per cent. in one year. The question here is one of liability—what it is the obligation of the city, as a debtor, to do, and not what it may see proper, of its own choice, to do, under a particular clause in the charter.

Did the legislature intend that the sections above cited, of the code of 1860, on the subject of executions, should be limited by adding thereto, as a proviso, that no force or effect shall be given to this act, so far as it shall apply to the City of Burlington, should its city council

impose, for the purpose of defraying the current expenses of the city, the full amount of tax its charter authorizes.

The circuit court have added this clause or proviso to the act, in sustaining the return, which assumes—1st. That such limitation, in its charter, extends to the general law; and next, that the exercise of the entire power given by the charter renders nugatory the provisions of the general statute.

"A proviso, in deeds or laws, is a limitation or exception to a grant made, or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless, in the case provided. A curious rule, of a very arbitrary nature, to which I have already alluded, prevails with regard to provisos. It is that, when the proviso of an act of Parliament is directly repugnant to the main body of it, the proviso shall stand, and be held a repeal of the purview, as it speaks the last intention of the makers."—(Sedgwick on Laws, 62, citing Voorhees vs. Bank of U. S., 10 Pet., 449, 471.)

Smith on Laws, 712, § 578, says: "A proviso is something engrafted upon a preceding enactment," and adds that the effect of it is the same as stated in Sedgwick, to control the statute. In Wayman vs. Southard, 10 Wheat., 1, (6 Pet. Cond., 8,) this court say: "The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause."

It is thus apparent that the circuit court reads the act of 1860 as though it had a proviso added to it, as above stated, by interpolating, in the general act, words which connect the act of 1853 therewith, in effect, as a proviso.

The act of 1860 is not obscure nor incomplete. It relates to one subject, and deals with it fully, and, standing by itself, can easily be executed. Why look to other statutes to add meaning to a plain law?

In a case cited in Sedgwick on Laws, 245, the court say: "The longer I sit here the more I feel the importance of seeking only the meaning of a statute according to a fair interpretation of its words, and resting upon that, says Patteson, J., I see the necessity of not importing into statutes words which are not to be found there. We are required, says Lord Denman, to add some arbitrary words to the section. We cannot introduce any such qualification. Tindal, C. J., says it is the duty of all courts to confine themselves to the words of the legislature—nothing adding thereto—nothing diminishing;" and a case from 3 Selden, 97, is cited, saying: "That which the words declare, is the meaning of the instrument, and neither courts nor legislatures have the right to add to, or take away, from that meaning. In Michigan, it has been said, it is only where a statute is ambiguous that courts exercise the power of so controlling its language as to give effect to what they may suppose to have been the intention of the law-maker."—(Id., 246, 247.)

A law that makes no reference to another, purports to be complete. If, on examination, it can be understood and can be executed, it should be administered as it stands.

Even the rule of construing statutes *in pari materia* together is resorted to only when some aid is required in order to get at the meaning of the legislature, in addition to the law under consideration. It is resorted to not that a question may thereby be raised, but that one arising on the ambiguity of the act, may be removed. Sedgwick says, p. 247, "it is well settled, that in construing a *doubtful* statute, and for the purpose of arriving at the legislative intent, all acts on the same subject-matter are to be taken together and examined, in order to arrive at the true result."

"The rule that statutes in *pari materia* are to be *consulted* for the construction of each other, holds good, though some of the statutes may have expired or even been repealed."—(Sedgwick, 250.)

"So, too, where one statute was undoubtedly under the consideration of the legislature when passing another, the former ought though long since expired, to *be taken into consideration* in construing the latter statute, and for the reason that it is a rule in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may have expired or are not referred to, must be taken to be one system, and construed consistently."—(Smith on Laws, sec. 638.)

"That several acts *in pari materia* and relating to the same subject are to be taken together, and be comprised in the construction of them, *because they are considered as having one object in view*, and as acting upon one system." —(Id., sec. 639.)

The fact that this rule includes statutes no longer in force, shows that it is to be limited in its operation only to the construction of the language used in the statute under consideration, and may therefore only aid in solving an ambiguity in such statute; it cannot be extended so as to have the effect of adding words to the statute under consideration. If when different statutes are considered together, the one will not affect the other unless some words be added, not contained in either, it is not permissible to make such addition, for the court could not know what words ought to be supplied.

In the case at bar the creditor does not find his remedy in the provision of the city charter, that authorizes the council to compel the people to pay a tax for such purposes as they adjudge to be current expenses; he rests upon the provisions of the execution law, which applies not only to the City of Burlington but to all civil corporations; which law, standing alone and unrestrained, gives him the remedy he asks for; and to restrain this law, and put a limitation on it that it does not contain, reference is made to the charter. If either statute was incomplete without the other, but taken together they made a complete system, then it might be said, not so much that

one was to be construed by the other, as that one was needed to supplement the other. But it is not pretended that the general statute is at all necessary to the charter, nor in any way relates to it, and this shows that the two are not to be taken as one law. Nor is there anything in the general statute to indicate that the other should be a part of it, and to add the other to it is to greatly impair its efficiency, if not entirely to render it nugatory.

Although, as a rule of construction, the act of 1853 may not change the meaning of the act of 1860, yet, as an independent and distinct statute in force, must it not have such effect? It was held by Mr. Justice Miller, in the case of the United States, ex rel. Larned v. The City of Burlington, decided in 1863 and reported 2 Amer. Law Register, new series, 394, that the two laws are to stand together as one. He says: "The provision of the code can have its effect by compelling the city council to levy the tax so far as it has power to levy it. The provisions of the charter can stand, as they were intended, as a useful and just limitation of that power."

The two laws in this way do not, however, stand together; for in executing one the other is reduced to a nullity. The creditor gets nothing by this law, as construed by the court below, excepting what his debtor may choose to give him. Here would be a law with no life in it, and the record in the case at bar says, "That heretofore, for many years, the council of said city has levied said tax of one per cent., and the proceeds of such levies, when collected, have been appropriated to the current expenses of the city." Now, to apply the above-quoted language of Mr. Justice Miller, that the provisions of the charter can stand as a limitation on the power to practice, we have only to hold that the two acts have a common limitation, to arrive at the result that the legislature intended that the provisions of the code should be of no coercive force, although they are found in the chapter on executions, designed for the express and exclusive purpose

of coercing debtors to pay debts which they would not pay without coercion. We have run into the result of construing a compulsory process against a debtor to be incapable of execution, unless by the voluntary action of the debtor. The legislature could not have intended, in the act of 1853, to limit the power of taxation provided in the act of 1860; the legislature, in 1860, have not in terms adopted the limitation contained in the act of 1853; and the two laws are independent of each other, and without judicial legislation the one cannot be made to limit the other.

It will further appear that it was not designed by the legislature that the one per cent. should be a fund common to the objects provided for by both acts, by the absurd results which ensue from assuming such to be the intention, and then endeavoring to execute the two laws as necessary to each other. Thus; the court having rendered a judgment against the city, issues a mandamus, as it is authorized by law to do, to enforce the provisions of the code of 1860, and is met by the fact shown in the return in this case, that the power of the council has been exhausted under another law. This being acquiesced in by the court, the result shows that the legislature has made it the duty of the court to issue this process of execution, but not to execute it. Here is a legal solecism, provided for by statute! But the court may not admit that the city shall have the preference which it claims over the common fund, and may insist that creditors shall have; and if it so holds it may cut off the city from all revenue. This result would produce infinite disorder. Or the court might take a course between these two; and with the intention of making the limitation practicable, and so as to serve the purposes of both laws and defeat neither, undertake to divide the fund between the two objects of the law; for in this view the two laws would have to be treated as one. It would not be consistent with such intention of the court to make the decision

arbitrary; as one-half to each, or one-third to one object and two-thirds to the other; as it might well be that for one object more than such proportion of taxes would be needed in some one year, and for the other less. It would therefore be necessary to make the division according to the emergencies of the occasion, and to allot to the city for its current expenses what the court should adjudge to be proper. How could such an operation be performed unless the court should investigate the various matters of business pertaining to city affairs, and decide for itself on the reasonableness or necessity of allowance or disallowance of all the matters acted on by the city council, under authority of the city charter, and thus act as an appellate tribunal in relation to current expenses of the city. This court say, in Voorhees vs. Bank of United States, 10 Pet., 449, 478, "when a court has jurisdiction, it has a right to decide every question that arises in the cause; and whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every other court," and the right and duty go coupled together, and therefore such questions must be decided by *the court*, when they arise in the progress of the cause, and the court will not permit such questions to be decided by any other tribunal.

Without pursuing this line of thought through all its ramifications, it will be seen that if a common fund is to be divided, confusion will ensue, and often a dead-lock occur between the court and city authorities; for as no direct appeal is given from them to the court, they might insist that all matters touching municipal expenditures were placed exclusively within their jurisdiction. If there is not to be a common fund divided, but each tax is to be separate, so that the aggregate shall not exceed one per cent., then conflicts must constantly arise, and questions of power be decided by the one tribunal or the other.

The law has not provided the machinery by which to carry on such a complicated and unprecedented system.

Mr. Justice Story says, in U. S. vs. Bassett, 2 Story, 389, 403: "The interpretation [of a statute] must in itself be reasonable. It must not be such as apparently was not, or could not be, within the legislative intendment. It must be such as will promote, and not such as will defeat or interfere with the policy upon which the statute purports to be founded. *A fortiori*, such an interpretation is not to be adopted to give effect to particular words, which will require on the part of the court the *introduction of new provisions and auxiliary clauses*, which the statute neither points out nor even hints at, and yet which are even indispensable to make such interpretation sensible or practicable."

It is apparent that if these statutes are by the court connected together, so as to read as one, in the practical application of them the court must introduce new provisions and auxiliary clauses; while each standing by itself is susceptible of being executed without conflict with any other. Nor is there anything in common between the laws beyond this, that each provides for the taxation of the people of the city.

The right to tax in the charter is a franchise, a delegation of so much sovereign power by the legislature to the city council. A franchise *must* be limited.

But the execution law of 1860 is a totally dissimilar law, nor is there any delegation of sovereign or legislative power to the court in the section providing for the tax. Nor does it vest a discretionary and arbitrary power in the court, like that deputed to the city council; for it is as obligatory on the court to order the tax to be raised as to render the judgment. The judgment, not the court, fixes the amount of the tax, and therefore there is no exercise of discretion in regard to this tax; neither as to whether it shall be raised nor as to the amount.

By the charter the power to tax is conferred upon the people in their capacity as a body politic; but by the other statute the incorporated people are subjected to the

laws for the collection of debts, as if a private person. In its capacity to act as law-maker the corporation should be limited; but in its responsibility to the general system of laws, and to the administration of justice, it should be unlimited and stand upon the same footing as all other persons, whether natural or artificial.

Even the state acknowledges itself liable to discharge its debts to the full extent that it contracts them. The law providing the tax to pay debts as a part of a remedy, is irrepealable as to the creditor and debtor; while the charter may be altered without impairing any contract.

If the laws of 1853 and 1860 are to be considered as properly belonging together, or as in *pari materia*, and as it is conceded that the act of 1860, standing alone, gives the power and imposes the obligation to tax without limit, how is the conclusion to be avoided that it repeals any conflicting provision in the prior act?

Let us next consider the effect of the acts of twenty-eighth January, 1855, chapters 128 and 146, above set out in the statement, with reference also to the interpretation given to those laws by this court. They were treated by this court as a legislative construction or enlargement of the provisions of the charter; and as the bonds in question were executed after those laws were passed, there is no question as to the full authority of the city council to issue them, and thereby, in subscribing to the stock in the railroad company, to bind the city to pay the principal and interest of the debt. "Whenever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end, is implied."—(1 Kent Com., 464.) And by this rule the city ordinance endorsed on the bonds was authorized by law, and became a part of the contract, namely:

"*Be it further enacted*, That it shall be the duty of the council *to provide means* to meet the payment of said bonds and coupons when the same may be due, according to the contract entered into for said loan, and to pay the same."

The means necessary could be provided only by taxation, and with these contracts in force, the act of 1860 was passed providing expressly for a taxation to pay these debts as they existed. Now, it is plain that this last law does repeal all other laws interfering with its operation. The court say, in United States vs. Irwin, 5 McLean, 180, that the general provision in a statute that all prior laws inconsistent with its enactments are repealed, "is only declaratory of the principle long since settled, that a posterior statute inconsistent with, and repugnant to, the provisions of a prior one, operates as a virtual repeal of the old law."

The following case is closely in point, and sustains the position of the plaintiff; that the laws of 1860 and 1855, in connection with the special agreement consisting in the bonds and ordinance, confer, independent of all previous laws, the power to tax sufficient to pay the judgment against the city, whatever may be the amount thereof, on bonds which the people, by vote, in pursuance to the charter, have authorized to be issued.

Commonwealth, ex rel. Hamilton vs. City of Pittsburg, 34 Penn., 496, was an application for mandamus on the city to levy a tax to pay interest on a railroad subscription. One defence was, that the power of the city to tax was limited by law, which provided "that no tax shall be laid in any one year exceeding half a cent on the dollar, unless some object of general utility shall be thought necessary, in which case a majority of the taxable inhabitants of said borough, by writing under their hands, shall approve of, and certify the same to the town council, who shall proceed to assess the same accordingly," and that this entire tax was needed for the ordinary uses of the city. The court, p. 522, 523, after reciting the above law, say—1st. That they are not satisfied that this law is applicable to the facts before it, thus: * * "But it is still an open question whether the law does impose on the councils such a restriction as to render the performance

of the act enjoined by the court, illegal. Now, without inquiring how far the powers of the councils were limited by the act of assembly incorporating the city of Pittsburg, it need only be noticed that the very act which authorized the subscription, also empowered, and as we have seen, made it the duty of the city to provide for the payment of the principal and interest of the debt incurred by the subscription, by the assessment and collection of such tax as may be necessary for that purpose. If there was any restriction on the rate of taxation before, it was certainly removed by the act of February 7, 1853, so far as relates to the levy of a tax for the payment of the principal and interest of the debt incurred by the subscription. When the legislature gave the power, it gave with it everything which was necessary for its exercise, and *repealed every statutory prohibition* of its enjoyment."

In Commonwealth vs. Commissioners of Alleghany, 40 Penn., 348, the court say: "The question now presented is, can the commissioners, as the law is, levy a tax exceeding ten mills in any one year? for if they can, we have decided that they must do it." The limitation referred to is to be found in a proviso to the act of 1834. It is as follows: "*Provided*, That no tax in any county shall in any one year exceed at the rate of one per cent. on every dollar of the valuation. Every question touching the power of the legislature to authorize county commissioners to make such a subscription as was made in this case, and the exercise of the power by such functionaries, has been heretofore decided, and the only question before us at this moment, is the effect of the grant of authority to create the debt, and to provide for the payment of interest, in view of this limitation. Did it enlarge the power to assess taxes to meet the demand? That it did we cannot doubt. * * * The act of 1843 authorized certain counties named, and among them Alleghany, to subscribe to the stock of the railroad, and the act of eighteenth April, 1853, gave authority to borrow

money to pay for the subscriptions so made, or to be made, and 'to make provision for the payment of the principal and interest of the money so borrowed, as in other cases of loans of said counties.' We have decided that issuing bonds was a mode of borrowing money. The commissioners of Alleghany made the subscription, and issued their bonds in payment, but refuse to provide for the payment of interest, alleging that they cannot exceed the limit of one per cent. per annum. They are required by the statute to make provision for the payment of interest. This was to be done in the usual mode adopted by counties. That certainly was by taxation, as that is the ordinary resource of municipal bodies. * * Now, the legislative mandate was to make provision in the ordinary way—that is, by taxation—without regard to any limitation whatever, excepting only the amount needed for the payment of interest. That is in conflict, say the respondents, with a former act limiting the amount of the annual tax. What of that? The legislature are to be presumed to have known that, and notwithstanding required the performance of a duty inconsistent with it. If the county made the subscription, she had the question of limitation in her own hands. The language was, in effect, if you subscribe you must provide money to pay interest. The county did subscribe, and the act referred to was undoubtedly an implied repeal of the limitation, which stood directly in the way of the performance of the duty enjoined. To hold otherwise would be to allow the clearest requirement of the law to be defeated, and a palpable fraud to be committed upon bondholders who advanced their money on the faith of the authority given and duty enjoined, as a consequence thereof, by the legislature. A construction leading to such results cannot be made in this case; the law is too plain for that."

It will be observed that the law in this case did not, *in terms*, say that a tax should be levied, but required that the county should "*make provision for the payment* of the

principal and interest of the money so borrowed, as in other cases of loans of counties." This, the court held, meant by taxation. In the case at bar the language of the ordinance, which is incorporated into the bond, is nearly the same, viz: "It shall be the duty of the council to *provide means to meet the payment* of said bonds and coupons."

In Amy vs. Alleghany City, 24 How., 364, a question arose as to the validity of bonds issued by Alleghany.

An act of fifth April, 1849, authorized the city to issue $200,000 bonds for subscription to a certain railroad company.

An act of eighth May, 1850, limited the power of the city to contract debt beyond $500,000, in addition to said $200,000, in these words: "It shall not be lawful for the councils of the city, either directly or indirectly, by bonds, or by virtue of any contract, or by any means or device whatever, to increase its indebtedness to a sum which, added to its existing debt, shall exceed $500,000, exclusive of the $200,000" railroad subscription. After this an act was passed, on fourteenth April, 1852, authorizing a second railroad subscription of $200,000 on same terms and conditions as the first. This act was silent as to the limit of debt, which, when it was passed, amounted to $700,000. It was insisted that the bonds issued under the last act were void, because contrary to the limitation on the city debt.

The court say the objection has arisen from a misconception of the act of 1850, which provides for a limitation of power on the city councils, "meaning obviously that no increase of debt should be made by the councils beyond the sum of $500,000, but not intending that the legislature might not authorize an increase of it beyond that amount, as it had previously done by authorizing the first subscription. The same political power which allowed the first subscription could, at a succeeding session of the legislature, give authority to the city to make a

second. The city councils could not, under its charter, have made either the first or second subscription without authority from the legislature; but by its charter it could contract debts for the purpose of its incorporation to a larger amount than $500,000."

Copes vs. Charleston, 10 Richardson, (South Car.,) 491, was a proceeding to restrain the city of Charleston from collecting a tax to pay a railroad subscription. In 1848 the subscription was made, and after that the tax was levied.—(491–2.) The charter only conferred general powers on the council to enact ordinances, and make such assessments for the benefit of the city as shall appear to them expedient.—(p. 494.) After the subscription was made in 1854, a law was passed saying that "all subscriptions heretofore made to any railroad, &c., and all bonds heretofore issued by them for the purpose of raising money, are hereby fully authorized and confirmed."—(p. 494.) The court below (p. 494), and the appellate court (p. 504), hold that whatever doubt existed before was removed by the act of 1854, saying: "But if the power of the city council was doubtful, by the act of 1854 the general assembly have confirmed the action of the city council."

This act of 1854, it will be observed, did not in terms authorize taxation.

In the case of the State ex rel. Dox vs. Johnson County, 12 Iowa, 237, 1861, a judgment had been given on bonds issued to a railroad for stock subscribed, and the agreement was that a tax should be levied to pay them. The court hold that a mandamus must issue to enforce raising a tax to pay the judgment. The court say, * "By the terms of the contract the faith of the county was pledged to the levy of a tax. * * So long as the validity of the bonds is recognized, neither the agents of the counties nor the courts, should countenance any proceeding which would militate against the strict and full legal rights of the holders."—(p. 244–5.)

In Coy vs. Lyons City, 17 Iowa, 1, judgment had been rendered on a demand against the city for land purchased for a cemetery, and application was made for a mandamus to compel levy of a tax to pay the same.

It was insisted for the city that the city alone had the discretionary power to fix the rate of taxation, and that therefore the court could not make any order in the case. The court ruled this against the city, and held that the duty to pay the debt was obligatory on the city, and could be enforced by mandamus. The next point decided was that this creditor, having obtained judgment, was entitled to priority of payment out of the tax to be levied. The next point decided was, that the council must lay the tax year after year, until sufficient money is raised to pay the judgment. The court say that the amount of tax to be raised in one year cannot exceed one per cent., the limit fixed by the city charter. But no question was made as to that; on the contrary it was "admitted by the parties * (11th.) That under the charter it is discretionary in the city council to levy a tax not exceeding ten mills on the property liable to taxation."—(p. 3, 4.) The petitioner asked for the levy of a tax within the limit of ten mills and was satisfied with that amount.

Oswald vs. Thedinga, 17 Iowa, 13, was an action against the city council of Dubuque for failing to levy a tax to pay a judgment rendered against the city, on sections demanded the issue of scrip, in payment of his judgment. 3267 to 3292 of the code of 1860. The petition was demurred to because it did not aver that the plaintiff had The court overruled the demurrer, saying that as the provision in the statute authorizing payment of judgments in such scrip was not valid, it was not necessary to make such useless averment. The court add—"of course if defendants had a legal excuse for refusing to levy the tax, as that the taxing power had been fully exhausted before the demand was made, or the like, there would be no personal liability. Such defence may arise in the ans-

wer, and in holding that the demurrer to the petition was improperly sustained, we by no means pass upon any question that may be involved in the excuse to be thus shown." This is all that this case decides or indicates.

In Porter vs. Thompson, 22 Iowa, 391, (1867,) an action was brought under sections 3275–6 of the code of 1860, against the city council of Dubuque, for failing to levy a special tax to pay a judgment. The plaintiff had a verdict below, and a new trial had been granted to defendant, and the plaintiff appealed. The court say, "the new trial was asked and given because the jury disregarded the instructions and the evidence, and because the verdict was contrary to both. * * * It would be inconsistent with all our former rulings to review the case, until tried upon the law as expounded by the court, instead of by the jury. * * We feel bound therefore to affirm the judgment and remand the case for a second trial, when the points can be more distinctly presented than seems to have been done on the trial. For we may be allowed to say, the instructions were very general; and there is nothing affirmatively showing that many, if any, of the specific points made before us, were brought to the attention of the court below."

The court then proceed to say on some of the questions they are clear and will pass upon them.

They then decide: 1st. That the above sections of the chapter on executions are valid. 2d. That they "do not pretend to be, nor are they in any just sense amendments to the charter of any city. * * They merely point out a remedy for enforcing judgments, when recovered against such corporations." 3d. "It was held in Oswald vs Thedinga, 17 Iowa, 13, that the creditor was not compelled to take scrip in payment of his judgment; and further, that the officers were individually liable after a demand to levy taxes, if within their power under the law, and a refusal to comply with such demand. With this view of the statute we are still content. Of course, as there sug-

gested, if the taxing power was at that time, or for that year exhausted, there would be no liability for the failure. For the statute must be construed in connection with the taxing power of the corporation. It was not intended that a special levy should be made, which, with prior or existing levies, would exceed the maximum rate fixed in the charter. * * And in the performance of this duty, the officers are not to neglect the equally imperative duty of providing means to pay the necessary current expenses of the corporation. And should these expenses absorb the whole taxes which the officers are allowed by law to levy, they would not be bound to comply with the demand; that is to say, if the actual necessary expenses of running the city government required a levy of one per cent. (the maximum rate allowed) there would be no liability for refusing to levy more, nor for a failure to set apart a portion of such levy in payment of the judgment. For the corporation must have the means requisite to its life."

All this is a mere comment on the previous case of Oswald vs. Thedinga; and, in neither case, did the point arise which the court was speaking of. Nor did it appear, in any of the cases, that the acts of January 25, 1855, were considered as applicable to the original foundation of the action. It is manifest that the facts and questions, in the cases above cited, were widely different from those in the case at bar.

F. A. DICK,
Of Counsel for Plaintiff in Error.

March, 1869.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, EX REL. HENRY AMY,
Plaintiff in Error,
vs.
THE MAYOR & ALDERMEN OF THE CITY OF BURLINGTON,
Defendants in Error.

ARGUMENT FOR THE DEFENDANTS IN ERROR.

By B. J. HALL.

SNOW & VOGT, PRINTERS, BURLINGTON, IOWA.

SUPREME COURT OF THE UNITED STATES.

No. 134.—December Term, 1868.

The United States, ex rel. Henry Amy,
Plaintiff in Error,
vs.
The Mayor & Aldermen of the City of Burlington,
Defendants in Error.

In Error to the Circuit Court of the United States for the District of Iowa.

Statement of the Case by the Defendant in Error.

The Relator, Henry Amy, filed an information for mandamus, upon which a rule was entered, and the alternative writ issued. The writ recites: that on May 15th, 1866, the Relator recovered judgment, in the Circuit Court of the United States for Iowa, against the City of Burlington, for $28,059.11 and costs, upon coupons on bonds issued by said City for Railroad subscription: that execution issued and had been returnad, no property found: that said City had no property subject to execution: that the general law of Iowa requires, in such case, that the City Council of Burlington should levy a tax as early as practicable to pay said judgment: that said Council are authorized by the charter to levy a tax of one per cent. per year upon the taxable property, which amounts to about 3,000,000: that under these laws it was the duty of the Council to levy a tax of one per cent. in the year 1866, on the valuation of said City to pay such judgment: that they have neglected to do so, though sufficient time has elapsed, and

demand has been made: that a levy of one per cent. in a single year is not sufficient, after paying cost of collection, to satisfy said judgment. The mandatory part of the writ directs the Council fothwith to levy and collect a tax of one per cent. on the taxable property of said city for the year 1867, and each succeeding year, until said judgment is paid, and to apply the tax when collected, to the payment of said judgment.

To this writ the Respondents made return: 1st, that by the charter of said city, the city Council had no authority to levy, upon the property of said city, a greater tax for any one year, than one per centum, that for many years last past, the Council had levied this amount, the proceeds whereof had been appropriated to pay the current expenses of said city: that for the year 1867, at the usual time, said Council had levied a tax of one per centum in the manner and for the purposes prescribed by the charter and ordinances of said city, which tax was then in process of collection. 2d, the Respondents return that they have been enjoined from levying any tax to pay off a portion of the indebtedness upon which said judgment was obtained, by a writ of Injunction issued out of the District Court of Iowa, &c.

To this return a demurrer was interposed by the Relator: that said return is no answer to the allegations, that the general law of the state require respondents to levy a tax sufficient to pay said judgment: it shows no cause why the respondents have not appropriated the tax of 1867 to the payment of said judgment: it does not show for what purpose the tax of 1867 is appropriated: Relator is entitled under the general laws of the state to a specific tax, and the city charter is no restraint upon this power: the Injunction from the state court is not binding on Relator, and is no bar to Relator's rights, &c.

The demurrer was overruled, and the Relator electing to abide by his demurrer, brings the case to this Court.

The section of the city charter relied upon by the Respondents, is as follows: "That to defray the current expenses of the city, "the city Council shall have the power to levy and collect taxes "on all the real and personal property in said city, not exempted "by the general law from taxation; provided that the amount of "taxes levied for said purpose shall not in any one year exceed one "dollar, on each one hundred dollars worth of property taxed." Sec. 1 Amendment of January 22d, 1853.

The general execution law referred to by the Relator is found in the Revision of 1860, Sec. 3274. Public buildings owned by the State, or any County, City, School district or other civil corporation, and any other public property, which is necessary and proper for carrying out the general purpose for which any such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation. Sec. 3275.

In case no property is found on which to levy, which is not exempted by the last section, or if the judgment creditor elect not to issue execution against such corporation, he is intitled to the amount of his judgment and cost in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs. Revision 1860, page 601–2.

ARGUMENT FOR RESPONDENTS.

Under the new system of pleading adopted by the Revision of Iowa, the Relator's demurrer is neither general nor special, but peculiar to the system, and having the elements of both, it must distinctly specify the grounds of objection, and of course all other objections are to be disregarded. Sec. 2877 of Revision, adopted by Circuit Court.

As to the sufficiency of the second part of the return which sets up the injunction issued by the State Court, but one suggestion will be made. The writ of mandamus was derived from the Common Law. From time to time, new subjects and new occasions were arising for the exercise of the writ: and by statutory provisions new directions were given to it. But never has it been held in the absence of express legislation, that the new provisions did not assume all the incidents of the Common law. As a learned writer has expressed it; Whatever is newly created by Statute, draws to itself the same qualities and incidents as if it had existed at Common law. 1 Bishop Cr. Law, § 85.

To whatever Court confided, and to whatever tribunal to be directed, the principles of the Common law still cling to the writ, and it is to issue or not, as by them may be tetermined.

The remaining assignments of the demurrer may be embraced in two general divisions:

1st. The return does not show that the Council have appropriated the one *per centum*, levied for 1867, or any part thereof, to the payment of Relator's Judgment.

2d. Even though a levy of one *per centum* for 1867 has been made, yet by the general execution Law, Respondents have power to levy a special tax sufficient to pay off the judgment, and the city charter is no restraint.

1.

The mandatory part of the writ requires the Council to levy a tax of one per centum for 1867, and each succeeding year, and apply said taxes when collected to the payment of said judgment, &c. The writ does not recite that the Council had refused to levy a tax for 1867, or failed to perform any duty for that year. It does not clearly recite that a demand had been made *prior* to the levy of 1866. At least Respondents were not required to show cause why they had not levied a tax and appropriated the

same for 1866. Had such been required, they could probably have shown that the revenue was consumed in meeting demands entitled to priority to Relator's. But the writ declares that a levy of one *per centum* in one year is not sufficient to satisfy the judgment. It does not aver that the proper time had yet arrived in 1867 for levying taxes, or that for that year the Council had in any respect failed. As matter of fact the time had not arrived, and the Council had not declined or neglected anything. It follows that the recitals of the writ as to neglect and refusal, are based upon the idea vaguely recited therein, and made distinct in the demurrer, that the City Council was not limited to one per centum, and the neglect consisted in not levying a sufficient amount, over and above one *per centum*, to satisfy the judgment. It is very manifest, that if the Council have not power to levy more than one *per centum*, then the Relator is not entitled to his writ in its present form; for its effect would be to seggregate the entire revenue, leaving the corporation without means to subsist. *Porter vs. Thompson*, 22 Iowa, 392.

If the Council levy the tax, they cannot be required to appropriate it or make a special tax of it. The Relator's lien will continue, but it is subject to the necessary current expenses of the Corporation, and the Council cannot be compelled to appropriate the balance until it has been collected, so as to enable them, not only to estimate their necessary expenditure, but also the amount of their funds.

The Relator does not show himself entitled to his writ. The Respondents had not, and have not failed to levy a tax for 1867, and the failure to appropriate or apportion it, occured subsequent to the writ. In argument upon the demurrer the Respondent is at liberty to impeach the writ.

Tapping on Man. marginal pages 374, 379–80.

It will not be denied that if the peremptory writ issue, following as it must, the alternative, the Council would be compelled

to levy the one *per centum* a second time for 1867; and as this power is lodged with the Council in trust for the public, it ought not to be so exercised if it is in fact limited to one *per centum*. If the recitals of the alternative writ themselves, or the return of the respondents show that the Relator requires more than he is entitled to, the rule will be discharged and the peremptory writ denied. From this it is evident that the important and real question in the record arises under the second division, and is whether the City Council has power to levy more than one per centum for all purposes in any one year.

2.

The foundation of Relator's Jundgment and the various questions incident thereto were merged in the higher contract of the Law. The questions of construction of Statutes which are constantly arising in all the departments of Law, are in a higher plane than those that base themselves upon the detailed transactions of men. The sole object of construction, is to ascertain from the language used, the intention of the Legislative mind. And the rules or canons established to aid in this interpretation are no longer doubtful or uncertain.

Very little need be said in this connection concerning *implied* power. The determination of implied power is simply the resolution of a question of construction. Does the power pass by implication? Is it necessary to give effect to the express powers, which must else fail? But no power can ever be implied, in the presence of express provisions upon the subject. In other words, implications arise only from silence or ambiguity, and not when the intention is express, either negative or affirmative. Whatever powers to levy taxes may have been conferred upon the City of Burlington, no implication can arise to enlarge an express restriction. Indeed so important a power as the levy of taxes could

not be conferred by implication; but must have express and unambiguous language. Blackwell on Tax Titles, 190 to 196.

As it will not be denied that the Charter contains an express restriction upon this power, it becomes important to assertain its precise force and meaning. It is anticipated that an argument will be constructed upon the words "Current Expenses," as found in the amendment to the City Charter of 1853, wherein it may be insisted that the payment of Judgments is not included within the purview of those terms. To this it is replied, that Section 1, 1853, see ante, p 3 is believed to be the only provision in force authorizing the levy of taxes for any purpose; and unless the Relator's Judgment comes within the purview of this act, he is entirely remediless, unless the general execution law, to be noticed hereafter, will aid him.

A brief review of the original and amended charter of the city will aid largely in understanding the meaning of these terms, "Current Expenses."

By Section 12 of the original act incorporating the city of Burlington, enacted by the Wisconsin Legislature, approved January 19th, 1838, it was provided: that the taxes levied by the Council "shall not exceed in any one year the sum of twenty-five cents on each one hundred dollars worth of property taxed, unless upon petition of a majority of the property holders of said City."

This was unquestionably a general limitation intended to restrain the levy of taxes for all purposes to twenty-five cents per one hundred dollars. It continued to be the law until 1845, when the original charter was expressly repealed, and the Act of June 10th, 1845, was substituted. Section 25 of this latter act is as follows:

"That to defray the current expense of said city, the city Coun-
"cil shall have power to levy and collect taxes on the real and

"personal property therein, *provided* the amount of taxes levied "shall not in any one year exceed twenty-five cents on each one "hundred dollars worth of property taxed."

It is remarkable that sections 12 of the charter of 1838, and section 25 of that of 1845, are the only sections in either of those acts that expressly confer upon the council the power to levy any taxes, and upon the principle, *expressio unius exclusio alterius*, it must be held that the only power to tax, lodged with the council was conferred by these sections; and as the *purposes* of taxation continued the same under each charter, it must follow that the objects of taxes contemplated in section 12 and 25 were identical.

But if there remain any doubt upon the question, it will be dispelled by referance to subsequent legislation.

Section 25, "to defray current expenses, &c.," remained upon the Statute book until 1847, when the Legislature submitted to the voters of the city, a proposition to reduce the amount of tax which the city Council might levy. It was presented in the following form: Sec. 1. "The amount of tax to be levied upon real "and personal estate by the Mayor and Aldermen of the City of "Burlington, after the taking effect of this act, shall not exceed "twelve and one-half cents on every one hundred dollars worth "of property to be assessed."

Here again is a general limitation; and it is introduced as a *reduction of a previous power to levy twenty-five mills to defray "current expenses."* That this is true, is manifest from the fact that this act of 1847, contains no repealing clause; but is introduced simply as a *reduciny* clause. Sec. 2 of the act, reads as follows:

"Before this act shall take effect, the qualified voters residing "within the limits of said city shall vote for or against the pro- "visions of this act; the vote upon which shall be put in this man- "ner; "are you in favor of, or against the reduction of the tax."

"If a majority of all the votes cast be in favor of a reduction, then "this act shall be in full force and effect, but not otherwise."

This act having been approved, by a vote of the citizens, became an amendment to the charter, and continued in force up to 1853, when the charter was again amended. From 1847 to this date, the power to tax, for all purposes, was limited to 12½ mills. If there be any distinction between a tax levied for "current expenses," and a tax levied for other indebtedness of a corporation, still these 12½ mills must have embraced "current expenses." In other words, the 12½ mills might all be levied for current expenses, unless the Council had seen proper to apportion it. It must be apparent, therefore, that the amendment of 1853 was a substitute for that of 1847,—a repeal, and not a mere addition thereto. It is as follows:

SEC. 1. "That to defray the current expenses of the city, the "City Council shall have the power to levy and collect taxes on all "the real and personal property in said city, not exempted by the "general law from taxation. Provided: that the amount of taxes "levied for said purpose, shall not in any one year exceed one dol-"lar on each one hundred dollars worth of property taxed."

SEC. 5. "So much of the present city charter as conflicts with "this act is hereby repealed."

The Legislature supposed they were repealing some previous legislation, and Sec. 1 above is the only one, which can be found, to conflict with any of the provisions of the charter. This conflict consists in its repugnance to Sec. 1 of the amendment of 1847. It enlarges the taxing power, which was previously limited to 12½ mills, to 1 per cent. on the hundred dollars. The conclusion is irresistible, that the words "current expenses" have been intended as synonymous with "all purposes." Otherwise, it must be true, that during a number of these years, the Council had no authority to levy any taxes for any thing but current expenses; and during the balance of the time, not for those.

Porter vs. Thompson, 22 Iowa, 395.

Charter of Dubuque, Laws of Iowa, 1857, page 349.

In addition, it is submitted that such use of these words is in accordance with the popular and common usage and meaning of the terms. Current expenses in connection with a period of time —year—signify the expenses of the current year. The expression may be appropriately rendered, "the flowing disbursements of the year," which are broad enough to include the payment of a judgment, not less than any other demand.

It is important also to consider that one *per centum* is the highest amount by far ever allowed to be levied by the city for all purposes. This amendment, following shortly after the general incorporation act of 1851,—see Code of 1851, § 665, must be supposed to have had some reference to the maximum limit of that act. Beginning originally with twenty-five mills for all purposes—then twenty-five mills for "current expenses," the former provision being repealed—then twelve and one-half mills for all purposes—and finally, one per centum to defray current expenses—it is incredible that the latter expression was intended to include merely the incidental expenses, leaving the more important, such as the public debt, &c., to be provided for by a tax, either unlimited, or restricted to so small an amount as 12½ mills. Particularly is the force of this to be appreciated, when it is considered that in all contemporaneous and subsequent legislation for municipal corporations, general andspecial, one *per centum* was, with one or two exceptions, the *maximum* allowed for all purposes.

In passing away from this legislation to the consideration of the general Execution Law, it may not be inappropriate to refer briefly to the general system of legislation upon the same subject matter, under the territorial and state governments of Wisconsin and Iowa. That such a reference is eminently proper, to aid in arriving at the correct interpretation of a statute, is a proposition well supported by authority.

Church vs. Crocker, 3 Mass. 17–21.
Thayer vs. Dudley, ib. 296.
Holland vs. Makepeace, 8 ib. 418, 423.
Holbrook vs. Holbrook, 1 Pick. 248, 254.
Mendon *vs.* Worcester, 10 ib. 235.
State *vs.* Baldwin, 2 Bailey, 541; ib. 554.

Beginning with the territorial Statutes of 1838, and following down through the territorial and state government of Iowa till 1851, during which period innumerable special acts of incorporation of towns and cities are to be found, not one appears, in which the taxing power has not been limited. Indeed it is safe to affirm that the Legislature of Iowa has never granted an unlimited tax power. Then, after this long list of special incorporations, there follows the general incorporation act of 1851, chap. 42, code of 1851, 105: and finally came the incorporation act of 1858, embodied in the Revision of 1860, in each of which, is found the limitation of one per centum for all purposes. This is one of the parts of an uniform system of incorporation. The charter of Burlington and its amendments are but illustrations of an undeviating purpose—manifesting an unwillingness to delegate, to these corporations, so important a power, without restriction. Upon this subject the legislative will has been constant; and in view of this uniformity it is scarcely necessary to enquire what was the mischief? or what the remedy?

But it is claimed that Sections 3274 and 3275, which took effect in 1851, as part of the general Execution Law, by implication, repeal and abrogate the limitation. These two sections are found on page 3 *ante*. This is the very question.

It will be conceded that there is no express repeal of any of the provisions of the charter, and the powers of the City Council are affected, if at all, by some supposed repugnancy between sections 3274–5, of the Revision

and the amendment of 1853. But there arises at once an idea of the anomalous relations existing between these Statutes, which seems to take them out of the rule of *pari materia*. First, there are the limitations in the Charters of 1838, 1845 and 1847. Then in 1851 was enacted the Execution law, embodied in the Code, which contained also the general incorporation acts. In 1853, is repeated the limitation as to the city of Burlington. In 1858 a new general incorporation law is enacted. And in 1860 the whole matter is again revised, and the incorporation acts and Execution law are retained side by side. It is submitted that an express declaration of the Legislature could not have more clearly or certainly indicated its will, that both provisions should stand upon the Statue, and that there was no repugnancy between them. Besides, in the rule of *pari materia*, there exists the idea of time. *Leges posteriores, priores contrarius abrogant.* But in its original enactment, the charter of 1853 was subsequent to the enactment of the Execution law, and it cannot be claimed that the Revision of 1860 is a re-enactment of the latter, in any such sense as to impair the former.

Before it is possible to determine whether there be any repugnancy between the two statutes, it is of course necessary to learn the intention of each. That of the tax limitations is apparent. But in the sections relied upon by Relator, there is perhaps more uncertainty. What was the mischief and what the remedy?

Formerly the execution, issued upon the Judgment, could be levied upon any property of the Civil Corporation, and upon the property of the citizens thereof.

Russel vs. Men of Devon 2 T. R., 667.

Adams vs, Wiscasset Bank, 1 Greenl. 361.

2 Kent's Comm. (3d Ed.) 274.

Riggs vs. Johnson Co., 6 Wall. 166.

It was proposed to obviate this, and also, to provide a

new species of execution, for which the old precedents furnished no title. The Legislative body of the corporation were to execute the Judgment through the exercise of their taxing power. Instead of the Marshal levying a suit of *Fieri Facias* upon the property of one citizen, the taxing power should make a levy upon the property of all. In other words the executive power of the Sheriff or Marshal, was exchanged for the tax power of the Council. But can it be contended that this change contemplated or effected a modification of the powers of either the one or the other? Not at all. The Marshal or Sheriff thereby lost none of his powers, and the taxing powers were in no wise abridged or enlarged; and the Statute, creating and providing them, remained intact and unrepealed.

No new or additional tax power was given; but simply a new impulse to that already existing, rendered additionally imperative by the penalties attached in Section 3276. This general execution act did not enlarge the power to create debts. It gave rise to no greater right or demand for the exercise of the taxing power than existed before—but simply declared it should be exercised and added the penalty. It was as much the duty of the Council to exhaust what taxing power they had, to pay legitimate debts, before this law was enacted, as after. The rendition of a judgment could not create the duty, for the adjudication itself presumes the duty to have existed anteriorly. This then was the remedy provided. The Council was required to exersise its power to levy taxes, in the manner, at the time, and subject to all the provisions and restrictions of law already existing upon that subject. It cannot be seriously contended that Sections 3274 and 3275 are amendments to the Charter of the City of Burlington. *Porter vs. Thompson*, 22 Iowa, 394.

The construction given to a Statute of a State by the highest judicial tribunal of such State, is regarded as part of the Statute, and is binding upon the Courts of the United States. *Sumner vs. Hicks*, 2 Black, 532. *Leffingwell vs. Warren*, Ib. 603.

Whilst there may be exceptions to this rule, it seems difficult to withdraw the present question from it. The levy of taxes by a City Council under Sections 3274–5, is a species of process—an execution. The act when done to satisfy a judgment in a Federal Court, is by authority and under its protection. *Riggs vs. Johnson County*, 6 Wallace, 166. It is true, these sections are provisions of State law, adopted by Federal authority. But they were adopted in order to make the process of the federal Court conform to those of the State Court—an object had in view by all the Federal legislation upon the subject, and which would, to some considerable extent, be defeated, unless the construction of these statutes by State Courts is to be accepted by the Federal Courts.

In *Oswald vs. Thedinga*, 17 Iowa, 13, and *Porter vs. Thompson*, 22 Iowa, 395, the Supreme Court of Iowa have expressly decided that sections 3274–5 of the Revision did not enlarge the power of a city Council to levy a tax greater than the amount prohibited by its charter. If the question had arisen more frequently, the decisions had been, in all probability, more numerous; but it is submitted that this is a settled construction, so far as the Supreme Court of Iowa is concerned.

If it be, that the general Execution law, enacted in 1851, and revised in the Revision of 1860, operated to repeal the restrictions of the Charter; it is by implication only. There is no express repeal. Repeals by implication are not favored. Laws are supposed to be enacted with deliberation, and with a knowledge of all existing ones on the same subject; and it is only reasonable to conclude that the legislature in passing a statute did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two were irreconcileable. In support of this doctrine, authorities might be infinitely multiplied. It is fully recognised in *McCool vs. Smith*, 1 Black, 459.

In the case at bar, wherein is the irreconcileable repugnancy between the two Statutes? The one provides that the City Council shall have power to levy taxes upon real and personal property, but not more than one *per centum* in any one year. The other, that, *as soon as practicable*, a tax shall be levied, sufficient to pay off the judgment, interest and cost. Both provisions were made to secure *identically the same demands* against the city, and in no wise did the general law enlarge the liability of the city, or add to its powers to create indebtedness. Is not that construction far more arbitrary, that strikes out the restrictive clause of the former, rather than adopt the construction given to both, by the Supreme Court of Iowa? When it is remembered how careful Courts have been not to encroach upon the domain of legislation, by declining to add to or take from the text, and in order to save the whole have construed permissive words as imperative; affirmative words negatively: conjunctives disjunctively, &c., &c.; it seems a court will find it not difficult to construe these Statutes, without discarding any portion of either.

"What then," says Mr. Bishop in his work on Criminal law, Vol. 1, § 94, "is the nature of that repugnance in a statute which repeals a pre-existing law? We have already seen (§ 77–88) how distinct Statutory and Common law provisions operate, one upon another, contracting, expanding and modifying each other; and how, when they so operate, their construction is not determined primarily, by the order in which they were established, but by other principles. Therefore where a provision of law is so modified or cut short by a later one, it is not in any proper sense repealed. And we may lay down the doctrine broadly, that no repeal takes place, if the earlier provisions can stand to any extent consistantly with the latter."

It is a rule that the more specific provision controls the general one, or as it has been otherwise expressed, "a thing given in particular shall not be taken away by general words.

Johnson vs. U. S., 3 McLean, 89.

U. S. *vs. Ballard* ib. 469.

Rex vs. Wyndham, Russ & Ry. 197, 3 Camp 78.

Churchill vs. Crease, 5 Bing. 177, 180.

Gregory's case, C. Co., 196.

Dwar. Stat. 2d ed. 514, 532.

Ottawa vs. La Salle, 12 Ill., 339.

It is laid down as a rule, that a general statute without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconciliably inconsistent.

Segdwick on Statutory Law, &c., 123.

6 Rep. 196.

Brown vs. County Com. 21 Penn. 37.

Omit vs. Commonwealth, 21 Penn. 427.

"A particular law is not repealed by a subsequent general law, unless there be such repugnancy between them, that they cannot both be complied with, *under any circumstances*" *De Armos* case 10 Mart. La. 158. 172.

"It cannot be contended that a subsequent act of Parlament will not control the provisions of a prior statute, if it was intended to have that operation: but there are several cases in the books to show that where the intention of the legislature was apparent that the subsequent act should not have such an operation, then even though the words of the statute taken strictly and grammatically would repeal the former act, the court of law judging for the benefit of the subject have held that they ought not to receive such a construction.

Sedgwick on Statute Law 124.

Williams vs. Pritchard, 4 D. & E. 2.

Williams vs. Williams, 4 Seld, 526.

Darcy's case, Cro. Eliz 512.

Paget vs. Foley, 2 Bing. N. C. 679.

R. vs. Pugh, 1 Dougl. 188.

In view of the legislation of Iowa restraining the taxing power of its municipal corporations—legislation prior, contemporaneous with and subsequent to the general execution law—is it not apparent that the Legislature did not intend the general act to have the effect of a repeal?

In case of doubt, a construction should be given favorable to the public. *Moran vs. Commissioners*, 2 Black, 723.

In Dwarris it is said to be a well settled rule of law, "that any "charge upon the subject must be imposed by clear and unambig- "uous language. When there is any ambiguity found, the con- "struction must be in favor of the public, because it is a general "rule that where the public are to be charged with a burden, the "intention of the legislature must be explicitly and distinctly "shown." Upon this point Chief Justice Ruffin remarks: "I do "not think that a strained construction is allowable of an act "which levies money from the citizen. The amount of the levy, "the subject of it, and the method of raising it, ought to be so "plainly pointed out, as to avoid all danger of oppression by an "erroneous interpretation; and where there is a fair doubt, the "citizen should have the benefit of it."

Dwarris on Stat. 749.

Sewell vs. Jones, 9 Pick, 414.

Savannah vs. Hartridge, 8 Geo. 30.

State vs. Bank of Newbern, 1 Dev. & Bat., Eq. R. 218.

The corporations of Iowa have been reproached with the "worst forms of repudiation" because they decline to exercise powers expressly witheld from them: and it has been announced, that such defenses "ought not to be sanctioned, if any fair legal construction can prevent it." But such suggestions are marred by the vice of *petitio principii:* and involve the rules of construction, with an element utterly foreign to their purpose—the attainment of an object, other than the intention of the law.

It is entirely without and beyond the record, that the construction claimed by Respondents, will enable these corporations to defy their creditors. It is not true in fact, as is evidenced by the growth and prosperity of western cities. If it were true, it but illustrates one of the objects of the limitations upon the taxing power imposed by positive legislation. What consideration shall the argument receive, that the restraint, upon this power, is availble only when there is neither disposition nor occasion to invade it; but that when the power to tax seeks, or is required, to over ride its limitations, they shall be rendered nugatory and unavailing?

B. J. HALL,

For Defendants in Error.